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Application Number 10/004,823

Filing Date December 7, 2001

First Named Inventor John R. Moody

Art Unit 3653

Examiner Name Michael E. Butler

Attorney Docket Number 2324 (GP-00-41)

ENCLOSURES (Check all that apply)

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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Ferrells, PLLC		
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Date	April 3, 2006	Reg. No.	31,158

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: :
John. R. Moody : Examiner: M. E. Butler
U.S. Serial No. 10/004,823 : Group Art Unit: 3653
Filed December 7, 2001 :
Docket No. 2324 (GP-00-41) :
For: Modified Gravity-Feed Multi-Fold Towel :
Dispenser :

Mail Stop Appeal Brief - Patents
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P.O. Box 1450
Alexandria, Virginia 22313-1450

REPLY BRIEF ON APPEAL UNDER 37 CFR §41.41

Sir:

Applicant submits herewith its reply to the Examiner's Answer mailed on March 22, 2006.

REPLY

Turning first to formal matters raised in the Examiner's answer of March 22, 2006, the Examiner objected to the Status of Claims and Summary of the Claimed Subject Matter appearing in Applicant's main brief on appeal. Undersigned counsel has reviewed that Brief and believes the Status of Claims and Summary of Claimed Subject Matter sections are adequate and sufficient in all respects. For example, the main brief explains the subject matter of Claim Groups I and II as follows:

The subject matter of independent Claim 1 is illustrated in **Figures 1 and 2-6** of the application as filed, and is described at page 6, line 13 through page 8, line 6. That disclosure is summarized briefly below.

The invention is practiced by abridging the dispensing slot of a dispenser as can be seen from **Figure 2**:

FIG. 2

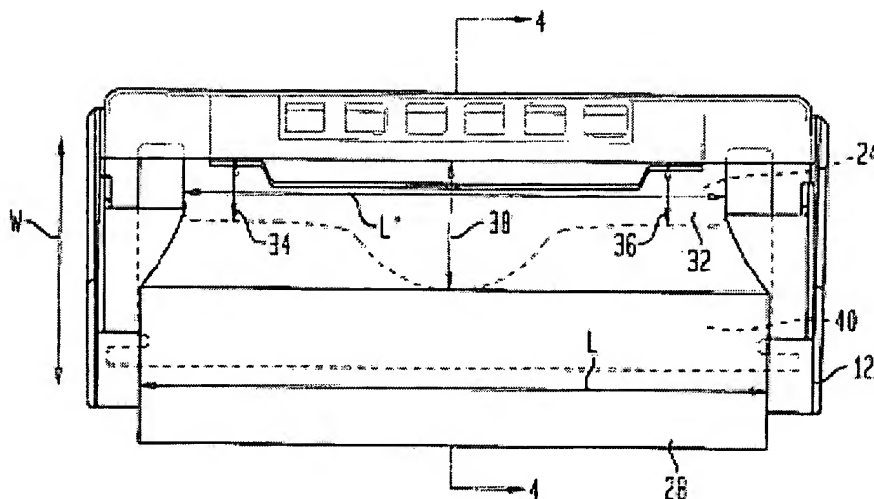


Figure 2 is a bottom view of a towel dispenser configured with an adapter plate in accordance with the present invention. The towel dispenser defines an elongate bottom dispensing aperture 24 through which a towel 28 passes upon dispensing. The towel 28 has a transverse length, L, and the dispensing aperture has a length of L or greater. The claimed invention operates to abridge the length of the dispensing aperture to a length, L', of from about 80 to 90 % of the transverse length, L, of the towel. A preferred embodiment of the adapter plate,

which is encompassed by Claims 2 through 6, can be further illustrated by **Figures 5 and 6**:

FIG. 5

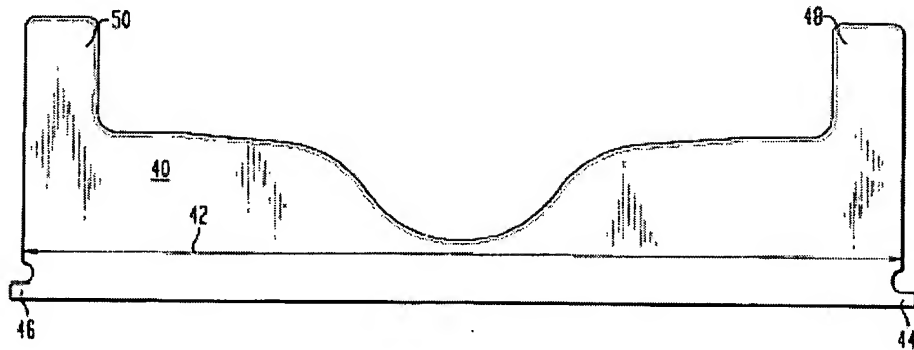


FIG. 6

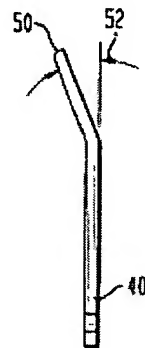


Plate **40** is an elongate member with a generally planar mid portion and further has two terminal portions **48, 50** (See **Figure 2, previous page**) projecting outwardly and upwardly with respect to the planar portion at an angle of inclination **52**. The terminal portions operate to abridge the length of the dispensing aperture when the plate is mounted in the bottom portion of the dispenser.

As to the Examiner's statements concerning argument of §181 issues in Applicant's main brief in this appeal, that Brief is not believed to contain argument directed to issues under 37 CFR 1.181; to the extent argument could be so construed, Counsel acknowledges such issues should be petitioned, not appealed.

In the Answer, the Examiner withdrew the following grounds of rejection:

The rejection of claims 1-10 and 21-22 under 35 U.S.C. §112 first paragraph was withdrawn;

The rejection of claims 1-10 and 21-22 under 35 U.S.C. §102 (b) evidenced by *Morand* (USP 6,003,723) was withdrawn;

The rejection to claims 1-5 and 7-10 under 35 U.S.C. §103 (a) evidenced by *Schutz et al.* (USP 5,950,863) was withdrawn;

The rejection to claims 1-5 and 7-10 under 35 U.S.C. §103 (a) evidenced by *Schutz et al.* in view of *Morand* was withdrawn; and

The rejection of claims 1-10 and 21-22 under 35 U.S.C. §103 (a) evidenced by *Frazier et al.* (USP 5,322,186) in view of *Morand* was withdrawn.

The Examiner continues, however, to object to the recitation of the towel length, **L**, in the claims under 35 USC §112, ¶ 2. The Examiner also continues to object to use of the term “about” in the claims despite the fact that it is standard practice and maintains an obviousness rejection altogether unsupported by the reference cited and altogether unsupported by certain photographs taken in a Crystal City restroom.

ARGUMENT

In the answer the Examiner reiterated the rejection of claims 1 – 10 and 21 – 22 under 35 United States Code §112, 2nd paragraph as to the term “about” 80 to 90 percent of the transverse length of the towel. The term “about” is widely used and is sufficiently definite to apprise one of skill in the art what the applicant regards as its invention. Generally, the phrase “about” is considered to be “clear but flexible and is deemed to be similar in meaning to terms such as ‘approximately’ or ‘nearly.’” *Ex parte Eastwood, Brindle, and Kolb*, 163 USPQ 316, 317 (B.P.A.I. 1969); *See also, BJ Services Co. v. Halliburton Energy Services Inc.*, 67 USPQ2d 1692, 1694 (Fed.

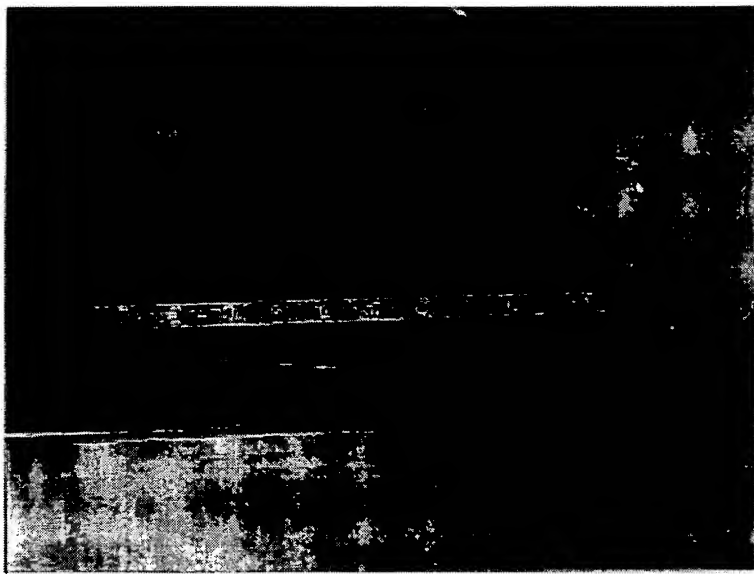
Cir. 2003); *W.L. Gore & Associates, Inc. v. Garlock*, 220 USPQ 303 (Fed. Cir. 1983). Applicant further notes on this point that two of the cited references contain similar claim language. (*Morand* at Claim 1, item (b); *Schutz* at claim 4). *See also* MPEP § 2173.05 (b) wherein it is noted when there is very close prior art and it is not possible to characterize the differences between the prior art and the claimed subject matter due to the use of the term “about” that the term is objectionable. Here, neither aspect of the exceptional circumstances where “about” language is objectionable is remotely applicable. The art is not close; no reference suggests an adapter plate shortening the aperture as is claimed. The art does not show any adapter plate abridging the length of a dispensing aperture to any significant degree at all; the Examiner’s comments notwithstanding. Moreover, the differences between any relevant art and the claimed subject matter is readily determined by linear measurement, using a ruler or a tape measure as shown in the pictures submitted by the Examiner, one of which is reproduced below. The word, “about” in a claim does not make the other recitation disappear as is noted in Applicant’s main brief. This rejection should be reversed.

The Examiner renewed the §112, ¶ 2 rejection as related to the towel length, **L**, arguing that premising the dimensions of the slot on the towel width is improper because it is an unclaimed extrinsic variable. This rejection is untenable because the towel length **L**, *is not an unclaimed extrinsic variable*, rather it is expressly recited in the claims, consider, for example, claim1:

1. A modified gravity-feed towel dispenser for dispensing C-fold and interfolded towels, wherein said dispenser houses C-fold or interfolded towels having a transverse length, **L**, which are positioned to be dispensed through an elongated bottom dispensing aperture having a length of **L** or greater, said towel dispenser including means for defining a top portion, a front wall, a back wall and a pair of side walls of said towel dispenser, as well as a bottom portion collectively defining an interior for receiving a stack of C-fold or interfolded towels, said bottom portion of said towel dispenser defining said elongated bottom dispensing aperture, wherein an adapter plate is secured to said bottom portion of said towel dispenser and is configured to abridge the length of said dispensing aperture to a length **L'** of from about 80 percent to about 90 percent of said transverse length, **L**, of said C-fold or interfolded towels.

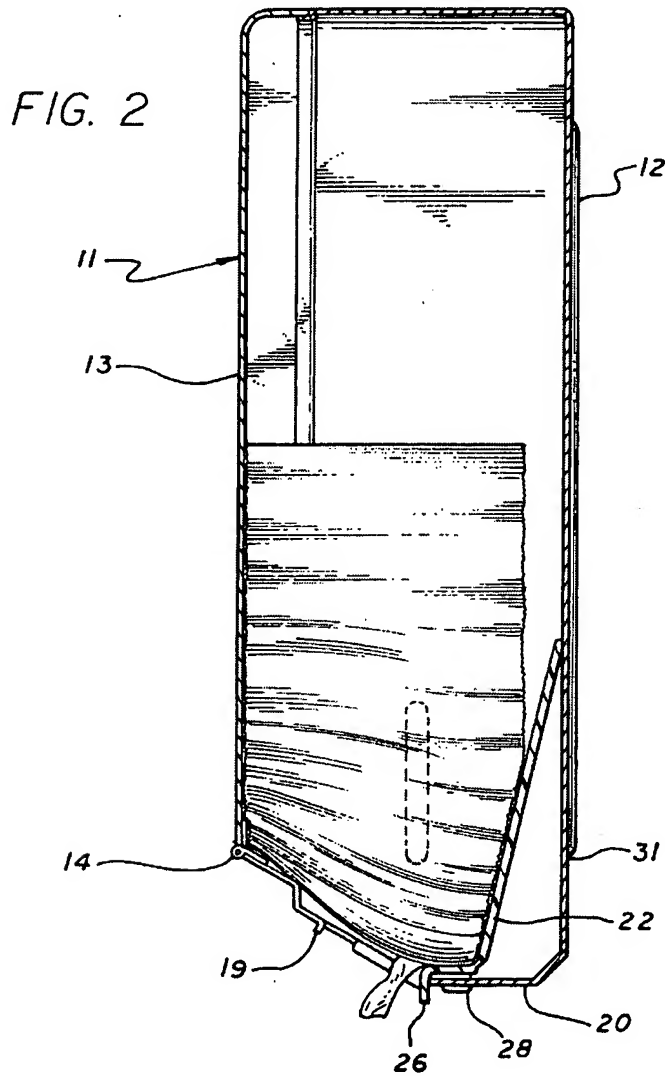
This rejection should likewise be reversed.

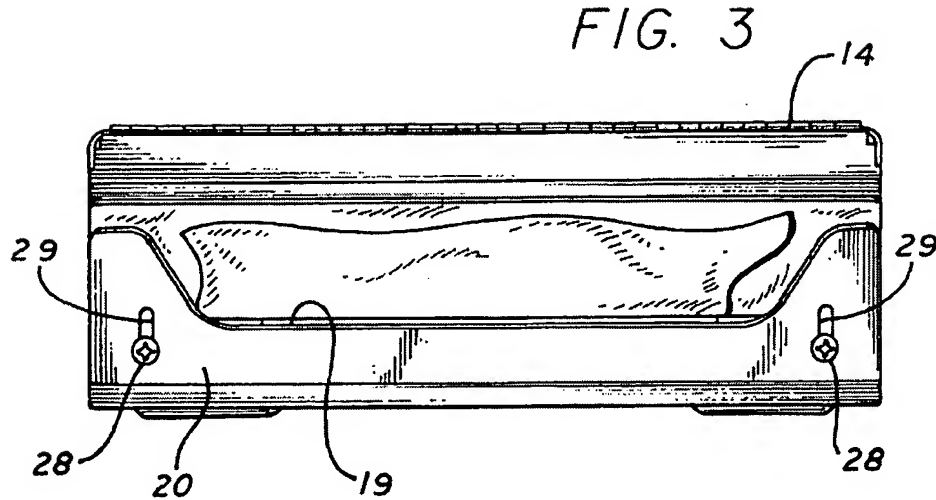
The rejection of Claims 1 to 8 and 21 to 22 under 35 United States Code as being unpatentable over *Gettelman et al.*, United States Patent No. 5,957,324 in view of certain photographs of a Bobrick 363 model towel dispenser in a Crystal City restroom were repeated. Those photographs show that the commercial dispenser does not have an adapter plate, nor is there any suggestion of providing a dispensing slot having a length of from about 80-90 percent of the towel length. Consider the following photograph which was attached to the *final rejection*:



The photograph shows that the dispensing slot extends from side to side of the dispenser, entirely consistent with the Bobrick dispenser shown in *Gettleman et al.* There does not appear to be any termination of the slot at all, not even at the 10 ½ inch mark on the measuring tape as is contended by the Examiner (which is about 95% of the magazine length in any event).

The adapter disclosed by the *Gettelman et al.* patent abridges the width of the storage cavity, not the length of the dispensing slot as recited by Claims 1 and 21. This can be seen by **Figures 2, 3** of *Gettelman et al.*, where the adapter **22** is an elongated piece and runs lengthwise with respect to the aperture:





Furthermore, the notion that the commercial PTO dispenser provides motivation to modify the adapter plate of *Gettelman et al.* is hindsight. An adapter plate modifies a dispenser, not vice-versa.

Note also, the dispensing aperture in Gettelman et al. extends the entire distance between sidewalls, consistent with the photographs submitted by the Examiner. Note that the producer of the commercial dispenser and the Assignee of Gettelman et al. '324 are the same – Bobrick Washroom Equipment, Inc.

The additional evidence overwhelmingly refutes the rejection based on *Gettelman et al.* '324 and the Bobrick dispenser. This rejection is also without merit and should be reversed in all respects.

Finally, the Examiner has disregarded the plentiful and convincing evidence of superior results in this case—the remarkable dispensing improvements are not even mentioned in the Answer. This is error warranting reversal. Even if the references, *prima facie*, suggested the claimed subject

matter, the remarkable results achieved would in any event render the claimed subject matter patentable. In this respect, note the data in the application as filed, on pages 8-9, summarized below:

Configuration: Example Nos.	% occurrence dispersing more than one towel	% occurrence towels falling out	Numbers of towels on floor
Prior Art: Examples 1-445 and 1055-1599	0.9	7	163
Present Invention: Examples 446- 1055 and Examples 1600- 2160 combined	0	0.001	1

The adapter plate of the invention is nearly 100% effective in preventing towels from unintentionally falling out of the dispenser. This remarkable result is achieved by simply abridging the length of the dispensing aperture to 80-90 percent of the transverse length of the towels to be dispensed, as is claimed.

New and useful results such as seen with the invention are patentable. *In re Wright*, 122 USPQ 522, 524 (C.C.P.A. 1959) is *apropos*:

Though the court may have believed that each of the elements in the patented device was old, it does not follow that the combination was unpatentable. We need not elaborate upon the rule that a novel combination of old elements which so cooperate with each other so as to produce a new and useful result or a substantial increase in efficiency, is patentable. See *Lewyt Corp. v. Health-Mor, Inc.*, 7 Cir., 181 F.2d 855, 85 USPQ 335, certiorari denied 340 U.S. 823, 71 S.Ct. 57, 95 L.Ed. 605, 87 USPQ 432; *Blaw-Knox Co. v. Lain Co.*, 7 Cir., 230 F.2d 373, 108 USPQ 356. *Weller Manufacturing Company v. Wen Products, Inc.*, 7 Cir., 231 F.2d 795, 798, 109 USPQ 73, 75 (1956).

CONCLUSION

For the above reasons, and for the reasons set forth in applicant's main brief, all outstanding rejections should be reversed and all claims should be allowed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael W. Ferrell". The signature is stylized with a large, sweeping "M" and a cursive "W".

Michael W. Ferrell
Reg. No. 31,158

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April 3, 2006

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